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87-999 (1)

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GORDON E. MC QUILLEN,
Petitioner,
v.
WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, and MORRIS ANDREWS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 10, 1987.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the "but for" standard of causation articulated in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), should be applied to determine remedy rather than liability in a mixed motives case brought under Title VII.

2. Whether the plaintiff or the defendant has the burden of persuasion on the "but for" issue once the plaintiff proves that discrimination was a motivating factor in the employment decision.

3. Whether an affirmative action plan which is not based upon findings of past discrimination, which is not tied to a relevant market, and which does not incorporate specific time limitations is illegal as a matter of law.

4. Whether WEAC's affirmative action plan was causally related to the respondents' failure to hire petitioner.

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Petitioner, Gordon E. McQuillen, hereby prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this matter and in support thereof states the following:

DECISIONS BELOW

The opinion of the district court appears in the appendix at A-18 through A-30. The opinion of the Court of Appeals, reported at 830 F.2d 659 (7th Cir. 1987), appears in the appendix at A-3 through A-17.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals (No. 86-1885) affirming the district court's order dismissing petitioner's Title VII action, was entered on September 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., and under 28 U.S.C. § 1331.

The petitioner, Gordon E. McQuillen, is a white male and was the plaintiff in a hiring discrimination claim brought under Title VII. The respondents, who were the defendants in the district court proceeding, include the Wisconsin Education Association Council (WEAC), which is a labor organization that represents public school district employees throughout Wisconsin and which is affiliated with the National Education Association (NEA), Morris Andrews, who is WEAC's Executive Director, and Donald Krahn, who is WEAC's Director of Legal Services.

In November, 1978, the petitioner began working for WEAC as a student law clerk. In January, 1981, after graduating from law school and being admitted to the bar in Wisconsin, he continued to work for WEAC as an attorney/clerk.

In October, 1982, WEAC began to solicit applicants for a newly created fifth staff attorney position through an internal posting procedure. Several attorney/clerks at WEAC, including the petitioner, applied for this position. In March, 1983, WEAC began to solicit outside applicants for this position. Melissa Cherney, the person ultimately selected for the position, applied pursuant to this outside posting.

By May 10, 1983, respondent Krahn had narrowed the total pool of applicants to 12 applicants. These twelve included

McQuillen and Cherney. Four of the twelve selected withdrew from consideration. Krahn and some of the current staff attorneys interviewed the remaining eight applicants. The applicant considered to have had the best interview subsequently withdrew from consideration. Krahn ranked McQuillen as having the second best interview, followed by Cherney.

After the interview process, Krahn narrowed the final selection pool to McQuillen, Cherney, and a third applicant. After having evaluated McQuillen and Cherney to be equally qualified for the position, Krahn then discussed their relative qualifications with respondent Andrews. Andrews told Krahn to offer the position to the woman from Milwaukee who was Cherney.

In June, 1983, approximately one week before Cherney was hired as the fifth staff attorney, WEAC amended its affirmative action policy to read as follows:

> 2. A serious systematic search shall be made for minority persons to fill WEAC's staff vacancies until such time as the ratio of minority persons on the staff reflects the proportion of minority personnel governed by WEAC.

The policy also provided that:

> WEAC managers shall: B. recruit, hire and promote in all position classifications without regard to . . . sex.

On July 17, 1985, the petitioner filed a hiring discrimination claim under Title VII. Following a full trial on the merits, the district court found that petitioner had produced direct evidence establishing that sex was a motivating factor in the decision to hire Cherney.

(App. at A-18). This evidence included a letter of recommendation written by Krahn for McQuillen which indicated that McQuillen's employment opportunities at WEAC were limited because WEAC's affirmative action program would require WEAC to search for a qualified woman if WEAC were to create a fifth attorney position. In addition, McQuillen presented evidence that Krahn had stated on several occasions that he was being pressured and did in fact desire to fill the staff counsel position with a woman.

Despite this direct evidence, the district court dismissed petitioner's hiring claim on the grounds that while petitioner was well qualified for the position, Cherney was more qualified and, therefore, while sex was a motivating factor in the decision to hire Cherney, it was not the determining factor.

Following entry of judgment, the petitioner moved to amend the judgment to include a finding that WEAC's affirmative action policy was illegal and for an award of attorney's fees as a prevailing party on a major issue in a Title VII suit. The court found that the plan was deficient in that it was not tied to a relevant labor market, it was not implemented to remedy past discrimination and it contained no time limitations. The court, however, concluded that the plan was too ambiguous to be declared illegal and that the word "search" in the plan was not necessarily a mandate to hire on the basis of sex. The court denied the motion.

The Seventh Circuit Court of Appeals subsequently affirmed the trial court's decision. The court ruled that "the bur-

den of persuasion on the but for issue rests with the employee" and that petitioner had not met this burden. (Ap. at A-14, n. 3). The court also ruled that the legality of the affirmative action plan was not relevant to the issue of discrimination because the petitioner failed to establish a causal link between the affirmative action plan and the hiring decision. (Ap. at A-16).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER THE APPROPRIATE STANDARD OF CAUSATION AND ALLOCATION OF THE BURDEN OF PROOF IN A MIXED MOTIVES CASE BROUGHT UNDER TITLE VII.

The Seventh Circuit's recent decision in McQuillen is in direct conflict with the other circuit courts of appeals over the appropriate standard of causation and the allocation of the burden of

proof in a mixed-motives[1] case brought under Title VII. First, the Seventh Circuit is in direct conflict with the Eighth Circuit over whether the "but for" standard should be used to determine liability or remedy in a mixed motives case. Second, there is a direct conflict between the Seventh Circuit and the majority of the circuit courts over

[1] A mixed-motives case is one where an employer is motivated by both lawful and unlawful considerations. In this situation, the question becomes, "how large a part the discriminatory factor must play in the decision before a court should hold that the decision was made 'because of' the prohibited criterion." See Brodin, "The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective", 82 Colum. L. Rev. 292, 293 (1982). In contrast, in a single-motive case the question is which one of the asserted reasons for a decision is in fact the true reason. It is the single-motive to which McDonnell Douglas v. Green, 111 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) are addressed.

whether the plaintiff or the defendant should carry the burden of proof on the "but for" issue. Supreme court resolution of these conflicts is vital to insure the effective and evenhanded administration of Title VII by the courts.

The Majority Position

The majority of Circuit Courts take the position that the "but for"[2] standard of causation articulated in Mt. Healthy is the appropriate standard to use in determining liability in a Title VII

[2] The "but for" standard is also known as the "same decision" standard. Under this standard, the plaintiff has the initial burden of proving that his constitutionally protected conduct was a motivating factor in the challenged decision. If this is accomplished, the burden then shifts to the employer to prove that the same decision would have been reached in the absence of the protected conduct. Mt. Healthy 429 U.S. at 287.

mixed motives case. Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985); Miles v. MNC Corporation, 750 F.2d 867, 875 (11th Cir. 1985); Smallwood v. United Airlines, Inc., 728 F.2d 614, 620 (4th Cir.), cert. denied, 469 U.S. 832, (1984); Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980). Under the "but for" standard, once a plaintiff proves that an unlawful factor was a motivating factor in an employment decision, either by direct evidence or through a traditional McDonnell Douglas analysis, the defendant may avoid Title VII liability by proving that the same decision would have been reached even absent the discriminatory motive.

The majority of the Circuit Courts have also followed the Mt. Healthy analysis in holding that the "same deci-

sion" defense is an affirmative defense and, therefore, the defendant bears the burden of proof on this issue. Fields v. Clark University, 817 F.2d 931, 936 (1st Cir 1987); Haskins v. Dept. of the Army, 808 F.2d 1192, 1198 (6th Cir. 1987); Miles 750 F.2d at 875; Marotta, 629 F.2d at 618; and Blalock, 775 F.2d at 712. Thus, under the majority view, once the plaintiff establishes that an unlawful factor is a motivating factor in an employment decision, the plaintiff cannot also be required to show that the factor was the "but for" cause of the decision.

The Seventh Circuit followed the majority approach in McQuillen in holding that the "but for" standard is the appropriate standard for determining liability in a mixed-motives case. However, the

Seventh Circuit departed from the majority position in holding that the petitioner had the burden of persuasion on the "but for" issue. In requiring the petitioner to prove that sex was the "but for" cause, the Seventh Circuit ignored the obvious proposition that the employer should carry the burden of proof on this issue because the employer is in the best position to prove which of its two motives was determinative. The court also ignored the fact that "[i]t is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been in his favor." Fields 817 F.2d at 936 (1st Cir. 1987) (quoting Justice Scalia in

Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983).

The Eighth Circuit Position

In contrast, the Eighth Circuit takes the position that the "but for" standard should not be used to determine liability in a mixed motives case. Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985). According to the Eighth Circuit, Title VII liability is established once a plaintiff proves that an unlawful factor played some part in the employment decision. Accordingly, the defendant may not avoid liability by proving that the same decision would have been reached even in the absence of the unlawful factor. The defendant, however, may limit the remedies available to the plaintiff if the defendant can show by a preponderance of the evidence that the unlawful factor

was not the "but for" cause of the decision.

Under the Eighth Circuit's view, a plaintiff is theoretically entitled to the full range of remedies available under Title VII including injunctive and declaratory relief, reinstatement or promotion, back pay, and attorney's fees, once he or she proves a discriminatory motive. The defendant can then avoid an award of back pay or reinstatement by showing that the plaintiff would not have been hired or promoted in the absence of discrimination because, for example, he or she was not qualified for the position. The plaintiff, however, would still be entitled to a declaratory judgment, partial attorney's fees, and, if appropriate, an injunction against future discrimination for having proven the

presence of a discriminatory factor even if the factor did not produce any tangible economic consequences.

By applying the "but for" test at the remedy stage as opposed to the liability stage of a Title VII suit, the Eighth Circuit's approach effectuates the two policy goals of Title VII: to eliminate and deter discrimination in employment and to compensate the victims of discrimination. By awarding attorney's fees and other forms of relief upon a showing that discrimination played some part in an employment decision, the Eighth Circuit's approach deters discrimination that is both subtle and overt. Furthermore, by applying the "but for" test at the remedy stage, and thereby allowing the defendant to avoid an award of reinstatement or back pay, the

Eighth Circuit's approach insures that Title VII plaintiffs are made whole without providing them with a windfall. Thus, the remedy may be "tailored" to fit the violation. Sheet Metal Workers v. EEOC, ____ U.S. ____, 92 L.Ed.2d 344, 106 S.Ct. 3019 (1986).

The Eighth Circuit's position that Title VII liability is established upon proof of discrimination, regardless of whether the discrimination resulted in any adverse tangible effects is also fully consistent with the language of § 703(a), 42 U.S.C. § 2000e-2(a) (1982) which provides that it is an unlawful practice for an employer to discriminate in any way which would deprive or tend to deprive any individual of employment opportunities:

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(Emphasis added).

The Eighth Circuit's approach of separating the issues of liability and remedy is also consistent with the structure of Title VII. While Title VII defines discrimination in § 703(a) of the

statute, it lists the remedies available and the ways in which an employer may limit the remedies available to a plaintiff in § 706(g), 42 U.S.C. § 2000e-5(g) (1982) of the statute:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay * * *, or any other equitable relief as the court deems appropriate. * * * No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused

> employment or advancement, or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(Emphasis added.)

Under this section, if a plaintiff establishes Title VII liability under § 703(a), he or she is theoretically entitled to all of the remedies enumerated therein until and unless it can be shown that the plaintiff would not have been hired or promoted even in the absence of discrimination. In this situation, the remedies available would then be limited to injunctive or declaratory relief. This coincides with the Eighth Circuit's position that an award of reinstatement or promotion or back pay is appropriate only after a finding that

discrimination was the "but for" cause of the employment decision.

While the Eighth Circuit's approach not only parallels the language and structure of Title VII, but also effectuates the policy goals of Title VII, the majority of Courts, including the Seventh Circuit have rejected this approach. Supreme Court resolution of this conflict is thus necessary because the majority of courts have assumed an interpretation of Title VII that is inconsistent with both the language of the statute and the policies which underlie its enactment.

Supreme Court resolution of this conflict and the conflict over whether the plaintiff or the defendant has the burden of proof on the "but for" issue is also necessary to insure the effective and evenhanded administration of Title

VII. As the law now stands, a plaintiff in a mixed motives case is held to a different standard of proof and is entitled to different remedies depending on the fortuitous circumstance of where he or she happens to file suit. If petitioner had filed suit in one of the circuits adhering to the majority position, WEAC rather than the petitioner would have had the burden of persuasion on the "but for" issue. Under this allocation of the burden of proof, petitioner may have prevailed on his Title VII claim. In addition, if the petitioner had filed suit in the Eighth Circuit, he would also have been entitled to an award of attorney's fees and injunctive or declaratory relief after having proven that sex was a motivating factor in the decision not to hire him.

II. CERTIORARI SHOULD BE GRANTED BECAUSE BOTH THE DISTRICT COURT'S RULING THAT WEAC'S AFFIRMATIVE ACTION PLAN WAS NOT ILLEGAL AND THE COURT OF APPEALS DECISION THAT THE PLAN WAS NOT CAUSALLY RELATED TO THE RESPONDENT'S FAILURE TO HIRE PETITIONER WERE CLEARLY ERRONEOUS.

A. The District Court's Ruling

The district court ruled that WEAC's affirmative action plan was not illegal after finding that the plan did not relate to any appropriate labor market, was not based upon any need to remedy past discrimination and did not contain any limitations as to time. The validity of an affirmative action plan under Title VII must be judged by two factors. First, the plan must be justified by the existence of a "manifest imbalance" that reflects an under representation of women or minorities in "traditionally segregated job categories." Second, the plan

must not unnecessarily trammel the rights of male employees or other non-minorities or create an absolute bar to their advancement. Johnson v. Transportation Agency, Santa Clara County, ___ U.S. ___, 94 L.Ed.2d 615, 107 S.Ct. 1442 (1987); Steel Workers v. Weber, 443 U.S. 193 (1979).

In finding that WEAC's affirmative action plan was not "based upon the need to remedy past discrimination or because of statistical disparity" the district court in effect found that WEAC's plan did not satisfy the first prong in testing the validity of an affirmative action plan. That WEAC's plan did not satisfy the first prong is evidenced by a comparison of the number of women who occupied the position of staff attorney at WEAC with the number of women who

occupied the position of road dispatcher in Johnson. In Johnson not one of the 238 road dispatcher positions was occupied by a woman. Thus, Johnson was a situation where the requisite manifest imbalance was shown by the "inexorable zero". Id., 94 L.Ed.2d at 1465 (O'Connor, J. concurring). In contrast, the "inexorable zero" was not present at WEAC where at least one position out of only four was occupied by a woman. That WEAC's affirmative action plan did not satisfy the first prong is also evidenced by the fact that the plan "did not relate to any appropriate labor market." (Ap. at A-25). In Johnson this Court specifically directed that "[i]n determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of

minorities or women in the employer's work force" should be made "with those in the labor force who possess the relevant qualifications." Id. at 631. WEAC's plan compares the percentage of women and minorities on WEAC's staff with the percentage of minorities and women who are currently members of WEAC. This is not an appropriate comparison for determining whether there is a manifest imbalance in the representation of minorities and women on WEAC's staff. To determine if there is a manifest imbalance, WEAC's plan should have compared the percentage of minorities and women on WEAC's staff with those in the labor market who possess the relevant qualifications.

Finally, WEAC's plan was also a strict quota system. WEAC's plan required that a serious systematic search

be made for minority persons to fill staff vacancies until such a time as the ratio of minority persons reflected the proportion of minority personnel governed by WEAC. The district court found that the word "search" was not a mandate to hire but rather was merely a suggestion. This interpretation, however, is contradicted by direct evidence offered by petitioner to the effect that WEAC's affirmative action plan required that the fifth staff attorney position be filled by a woman or other minority. In addition, respondents Krahn and Andrews in effect followed WEAC's plan as though it were mandate in that they continued to search for a qualified woman to fill the position by posting externally even though a qualified male, the petitioner, had already applied for the position.

Thus, contrary to the district court's findings, WEAC's plan was in fact a mandate to hire that "unnecessarily trammeled the rights of male employees." Id. at 634.

B. The Court Of Appeals Decision

The Court of Appeals decision that the legality of the affirmative action plan was not relevant to the issue of discrimination because the petitioner failed to establish a causal link between the affirmative action plan and the hiring decision was also clearly erroneous.

This decision ignores the respondent Krahn's admission that the petitioner's employment opportunities at WEAC were limited because WEAC's affirmative action program would require WEAC to search for a qualified woman if WEAC were to create

a fifth attorney position. When this admission is considered in conjunction with WEAC's amendment of its plan just prior to the hiring decision so as to incorporate a quota and Krahn's statements that he was being pressured and desired to hire a female for the fifth attorney position, the causal link between WEAC's plan and the hiring decision cannot be denied.

CONCLUSION

The judgment of the Seventh Circuit Court of Appeals is in direct conflict with Bibbs where the Eighth Circuit held that the Mt. Healthy "but for" test should be used to determine remedy rather than liability in a Title VII mixed-motives case. The judgment of the Seventh Circuit Court is also in direct conflict with the majority of courts

which hold that the defendant rather than the plaintiff has the burden of persuasion on the "but for" issue. Finally, the judgment of the Seventh Circuit Court in holding that WEAC's affirmative action plan was not causally related to the hiring process and therefore irrelevant to the issue of discrimination was clearly erroneous. Therefore, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GORDON E. MC QUILLEN,
Petitioner,
v.
WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, and MORRIS ANDREWS,
Respondents.

APPENDIX OF THE PETITIONER, GORDON E. MC QUILLEN

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JUDGMENT -- ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 14, 1987.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

GORDON E. MC QUILLEN,
Plaintiff-Appellant,
No. 86-1885
vs.
WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD A. KRAHN, and MORRIS ANDREWS,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin

No. 85 C 648
JOHN C. SHABAZ, Judge

The cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS

ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1885

GORDON E. MCQUILLEN,

Plaintiff-Appellant,

v.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, and MORRIS ANDREWS,

Defendants-Appellees.

Appeal from United States District Court for the Western District of Wisconsin.
No. 85-C-648-S—**John C. Shabaz**, *Judge.*

ARGUED JANUARY 14, 1987—DECIDED SEPTEMBER 14, 1987

Before WOOD, COFFEY and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Plaintiff-Appellant, Gordon McQuillen, appeals the district court's judgment against him after trial on his hiring discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. We affirm.

I.

Defendant Wisconsin Education Association Council (WEAC) is a labor organization that represents public school district employees throughout Wisconsin. WEAC is affiliated with the National Education Association (NEA).

Defendant Morris Andrews is WEAC's Executive Director. Defendant Donald Krahn is WEAC's Director of Legal Services.

Prior to 1974, WEAC exclusively retained outside counsel to handle its legal matters. Since that time, WEAC has hired staff attorneys with a view towards eliminating the need for outside counsel. Along with the staff attorneys, WEAC has also employed law clerks. These clerks have usually been students at the University of Wisconsin Law School. Some clerks, however, have been licensed attorneys. The staff attorneys at WEAC are represented by the United Staff Union ("the Union"). The law clerks, including the Attorneys-Clerks, are not represented by the Union.

Plaintiff, Gordon McQuillen, began working for WEAC as a student law clerk in November, 1978. In January of 1981, after graduating from law school, he was admitted to practice in Wisconsin. Thereafter he continued to work with WEAC with the title of Attorney-Clerk.

In the summer of 1982, WEAC's legal department consisted of four staff attorneys and several law clerks. Among these clerks were three licensed attorneys, McQuillen, Jeanine Larson and Carol Rubin. At the end of that summer, WEAC decided that it needed to hire a fifth staff attorney. Pursuant to the terms of the governing collective bargaining agreement between WEAC and the Union, a notice announcing the new staff attorney position was posted internally in October, 1982. WEAC did not solicit outside applicants until March 1, 1983. According to WEAC, the long delay resulted from its attempts to negotiate a lower pay scale for the fifth staff attorney position with the Union. Further adding to the delay was WEAC's involvement in NLRB hearings over a representation petition the Union had filed.

McQuillen and Jeanine Larson applied for the position soon after WEAC posted the position internally. Attorney-Clerk Carol Rubin also expressed interest in the position. Although viewed as an excellent candidate, she chose to

withdraw from consideration before the hiring process was completed because she had an outstanding job offer from another employer. After soliciting outside applicants WEAC received approximately 64 more applications for the fifth staff attorney position.

Once he received all the applications, Donald Krahn, WEAC's Director of Legal Services, invited WEAC's incumbent staff attorneys to examine the applications to acquaint themselves with the applicants' credentials. By May 10, 1983, Krahn narrowed the pool to 12 applicants for further consideration. These twelve included McQuillen and Larson, as well as the person who eventually received the position, Melissa Cherney. Four of the twelve selected by Krahn soon withdrew from consideration. Krahn and some of the current staff attorneys interviewed the remaining eight applicants. Harold Menendez, the applicant considered to have had the best interview, subsequently withdrew from consideration. Krahn ranked McQuillen as having the second best interview, followed by Cherney.

After the interview process, Krahn narrowed the final selection pool to McQuillen, Cherney, and a third applicant, a woman named Jackie Kinnaman. On June 10, 1983, Krahn forwarded a memorandum detailing McQuillen's, Cherney's and Kinnaman's relative qualifications to Morris Andrews, WEAC's Executive Director. Andrews and Krahn subsequently discussed the three candidates' qualifications. On June 23, 1983, Andrews told Krahn to offer the position to Cherney. Krahn then offered and Cherney accepted the position.

At the time the challenged position was being filled, WEAC had a policy it referred to as its "Affirmative Action" policy. This policy stated:

> Affirmative Action
>
> A. WEAC Staff.
>
> 1. Minority is defined as Black, Native American, Chicano, Asian-American, and Women.

> 2. A serious systematic search shall be made for minority persons to fill WEAC staff vacancies until such time as the ratio of minority persons on the staff is balanced.

In June of 1983, approximately one week before WEAC made its hiring decision, WEAC amended paragraph 2 of the policy to read:

> 2. A serious systematic search shall be made for minority persons to fill WEAC staff vacancies until such time as the ratio of minority persons on the staff reflects the proportion of minority personnel governed by WEAC.

Further on, the policy provided:

> . . . WEAC managers shall:
>
> B. Recruit, hire, and promote in all position classifications without regard to . . . sex . . . .

II.

PROCEEDINGS IN DISTRICT COURT

After Cherney received the staff attorney position, McQuillen cried foul. Contending that he had not received the position because of his sex, McQuillen brought suit under Title VII.[1]

At trial, McQuillen claimed that absent the defendants' preference to hire a woman, he would have received the position soon after WEAC posted the position internally. According to McQuillen, WEAC sought outside applicants for the position only as part of an effort to find a woman or minority for the staff counsel position. He further claimed that absent WEAC's preference to hire a woman, he would

[1] At trial, McQuillen also claimed that the defendants retaliated against him for filing a sex discrimination charge in violation of 42 U.S.C. § 2000e-3(a). The district court found against McQuillen on this issue and McQuillen does not challenge that finding on appeal.

have been chosen over Cherney. He introduced considerable evidence to substantiate his claim.

McQuillen established at trial that he had done fine work for WEAC in the past and was well regarded by his peers. In fact, all four of the current staff attorneys recommended him for the position.

He also presented considerable direct evidence that WEAC officials wanted to hire a woman for the position. For example, he produced a letter that Krahn wrote in June of 1982 in response to a potential employer who inquired about McQuillen. In pertinent part the letter stated:

> Gordon would very much like to be a WEAC Staff Counsel. Our affirmative action program would require us to search for a qualified woman, if we were to create a fifth attorney position. Thus, his chances for employment here are very limited. It would be a genuine loss for all of us if he had to leave Wisconsin in order to find a permanent position in teacher labor relations. He will make a very good employee.

Besides this letter, McQuillen presented evidence that Krahn had told McQuillen as well as several of the staff counsel that he was being pressured to fill the position with a woman or minority group applicant.

McQuillen also claimed that WEAC's "affirmative action" policy victimized him. He provided evidence that WEAC's parent organization, the NEA, exerted great pressure on WEAC to hire employees under a strict quota system. He also pointed out that Andrews had never made the hiring decision for a staff attorney position prior to selecting Cherney.

In response to McQuillen's evidence, WEAC claimed that it handled the hiring procedure in a nondiscriminatory fashion and chose Cherney for the position because she was the most qualified candidate. WEAC emphasized that it never had a policy to offer staff attorney positions to attorney-clerks before soliciting outside applicants. It noted that its October 19, 1982 posting was simply to comply

with a collective bargaining agreement provision requiring posting and was certainly not intended to constitute the entire hiring process. WEAC also noted that, absent exceptional circumstances, it had always hired its attorneys from applicant pools in the same way it hired Cherney. A male applicant who received the fourth staff attorney position in 1982 was hired pursuant to the same general procedure.

WEAC further stressed that McQuillen's contention that external candidates were sought only to find a woman for the position did not make sense. Two of the three internal candidates were women. One of these candidates, Carol Rubin, was an excellent candidate who left WEAC because WEAC would not accelerate the hiring procedure to accommodate her. The other internal candidate, Jeanine Larson, was among the twelve finalists for the new position.

WEAC contended that the decision to hire Cherney was simply a case of choosing the most qualified candidate. Cherney had excellent academic credentials, graduating with honors from the University of Wisconsin Law School. Her professional experience was diverse and well suited to WEAC's needs. Prior to applying for the position, Cherney had worked as a lawyer for three years with the National Labor Relations Board. She had also had clinical and clerkship experience with the Wisconsin Employment Relations Commission, the Wisconsin Department of Justice, and a law firm utilized by WEAC.

Although McQuillen had done good work with WEAC, his academic record was not as distinguished as Cherney's and his work experience had not been as diverse. Furthermore, in 1982 WEAC had rejected McQuillen for the fourth staff attorney position. After that rejection, Krahn had told McQuillen that if he wanted to become a staff attorney he should obtain employment elsewhere, such as at the NLRB, in order to round out his experience. With the exception of one attorney, all previous staff attorneys had experience with outside organizations such as the

NLRB, the Wisconsin Department of Justice, or the Wisconsin Employment Relations Commission.

At trial, WEAC downplayed Krahn's letter which claimed that McQuillen's chances for promotion were not good because WEAC was required to "search for a qualified woman" to satisfy its affirmative action program. The defendants claimed that Krahn was simply trying to cast the most favorable light on his opinion that McQuillen could not survive in open competition for a staff attorney position.

WEAC also discounted the staff attorneys' recommendations, noting that when McQuillen applied for the position open in 1982, several of the same staff attorneys recommended against hiring him. At that time, many of these same staff attorneys had told Krahn that WEAC could get higher quality candidates by soliciting outside applicants. WEAC also pointed out that the staff counsel were personal friends, as well as professional colleagues, of McQuillen's.

Finally, WEAC claimed that its "affirmative action" plan sought only to ensure that women and minorities are included in the applicant pool. The "affirmative action" plan, WEAC argued, had nothing to do with the hiring decision.

At the conclusion of trial, the district court entered judgment in favor of the defendants. The district court did find that sex was a factor in the employment decision since both Krahn and Andrews preferred to hire a female or minority employee. The court specifically noted that WEAC was under pressure from the NEA to adopt what Andrews considered to be unlawful employment practices. There was testimony at trial that one of the NEA's standards for affiliation was the adoption of affirmative action targets or quotas—apparently without regard to whether there was any justification to discriminate against males and other non-favored individuals. Although finding that sex did factor into the decision, the district court found that it was not a determining factor in Andrews' ultimate decision to hire Cherney.

According to the district court, the exaggerated participation of McQuillen's colleagues in the hiring process, coupled with the political pressure on WEAC to hire women, led to a seriously flawed hiring procedure. The court found that, nonetheless, Cherney was the most qualified candidate and that she received the position because she was the most qualified candidate, not because she was a woman.

After the court entered judgment against him, McQuillen moved for a new trial, or alternatively, to amend the judgment to declare that WEAC's "affirmative action" plan was a determining factor in the employment decision and that the plan was unlawful. The district court found no causal connection between the "affirmative action" plan and the hiring decision, and denied McQuillen's request for a new trial. Given the district court's finding that Cherney received the job because of her superior qualifications, plaintiff essentially wanted the district court to completely reverse its previous factual findings. Despite denying the motion for a new trial on the ground that no causal connection existed between the "affirmative action" plan and the hiring decision, the district court went on to address the plan's legality.

As an initial matter, the district court found the so-called "affirmative action" program to be so confusing and ambiguous that no one, not even those who were responsible for administering the plan, was quite sure what it said. The district court also found the plan did not relate to an appropriate labor market and was not based upon the need to remedy past discrimination or a manifest imbalance in the work force. (WEAC's membership had approximately 58-62% female and minority members, while WEAC's staff was approximately 40% female and minority.) Nonetheless, the district court held that the plan was not impermissible because it only required WEAC to "search"[2] for qualified women and minorities but did

[2] In upholding the validity of the plan the district court did not clarify what it meant by the term "search." WEAC contended that

(Footnote continued on following page)

not require them to be hired over more qualified individuals. The district court also stated that the plan probably served "no useful purpose other than to appease the NEA and to spawn litigation."

III.

ISSUES ON APPEAL

There are three issues on appeal: (1) whether the district court erred when it applied a "but for" standard of causation to McQuillen's hiring discrimination claim; (2) whether the district court's finding that sex was not a determining factor in the hiring decision was clearly erroneous; and (3) whether the district court erroneously failed to declare that WEAC's "affirmative action" plan violates Title VII (and therefore award plaintiff's attorney's fees as a "prevailing party" on a substantial issue involved in the litigation).

[2] *continued*

to "search" meant only to avoid an "old boy" word-of-mouth application procedure by instituting a comprehensive solicitation procedure that would be sure to create the broadest possible applicant pool containing the most talent to choose from. In essence, WEAC was contending that its "affirmative action" plan was not really an "affirmative action" plan, because no preference is given to women or minorities. On the other hand, McQuillen contends with some force that within the context of the plan "to search" means that, until the "quota of women and minorities was filled", WEAC is required to leave the position vacant and to keep looking for women and minorities for the position even though qualified white, male applicants are available. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (prima facie case of discrimination established by showing that, after applicant's rejection, "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.") As will be discussed herein, we need not delve into the validity of this highly ambiguous and confusing "affirmative action" plan as there was no causal connection between the plan and McQuillen's rejection for the staff counsel position.

IV.

ANALYSIS

A. *"But For" Standard of Causation.*

McQuillen's first ground of appeal is that the district court erroneously applied a "but for" standard of causation to his hiring discrimination claim. He claims that a plaintiff need only show that sex was a factor in an employment decision to establish a Title VII violation. We disagree.

It is well settled in this circuit that "the ultimate inquiry in a Title VII disparate treatment claim is whether a discriminatory intent was a 'but for' cause of the adverse action." *See Germane v. Heckler*, 804 F.2d 366, 368 (7th Cir. 1986); *see also Maguire v. Marquette University*, 814 F.2d 1213, 1216 (7th Cir. 1987); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1233 n.4 (7th Cir. 1986); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 928 (7th Cir. 1984); *Sherkow v. Wisconsin*, 630 F.2d 498, 502 (7th Cir. 1980); *Mathews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985) (ADEA). Under this "but for" standard of causation it is not enough for an employee to show that an employer harbored some discriminatory motivation. Rather, the employee must establish that the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation. *See, e.g., Wheeler*, 794 F.2d at 1233 n.4; *Sherkow*, 630 F.2d at 502.

Without citing any of the controlling Seventh Circuit authority on this issue, McQuillen urges us to apply the standard of causation applied by the Eighth Circuit in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (*en banc*). Under *Bibbs*, a plaintiff establishes Title VII liability merely by showing "that an unlawful motive played some part in the employment decision." *Id.* at 1323. At that point the employee is presumably entitled to the full range of remedies under Title VII, including instatement, back pay, declaratory relief and attorney's fees. However, an

employer may limit the remedies available to the employee if it can establish that, notwithstanding the discriminatory motivation, the employee would not have received the position. If the employer prevails on the "but for" issue, the employee may not receive instatement and back pay, though he still may receive other remedies such as attorney's fees and declaratory relief. *Id.* at 1324. Thus, unlike the Seventh Circuit where the "but for" analysis goes to the issue of liability itself, under *Bibbs* the "but for" analysis is relevant only to the issue of remedies.

We decline to upset well settled Seventh Circuit precedent on this issue by applying *Bibbs*. The "but for" standard applied in this circuit is supported both by Title VII's language and Supreme Court authority. Title VII contains a clear causal requirement between discriminatory motivation and the challenged employment decision. In pertinent part, Title VII makes it "an unlawful employment practice for an employer—. . . to fail or refuse to hire . . . any individual . . . *because* of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a) (emphasis added). The "but for" standard of causation reflects the causal requirement contained in the statute. Here, the district court found that WEAC hired Cherney *because* she was the more qualified candidate, not *because* of her sex. Likewise, McQuillen was not hired *because* he was considered relatively less qualified, not *because* of his sex.

Furthermore, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Supreme Court made clear that the "but for" standard of causation is the appropriate standard to be applied in Title VII actions. In that case, the Supreme Court rejected arguments that a plaintiff is required to show that race was the sole reason for the employment decision. Rather, the Court stated that "no more is required to be shown than that race was a '*but for*' cause." *Id.* at 282 n.10; *accord Mt. Healthy v. Doyle*, 429 U.S. 274 (1977) (no First Amendment *liability* if employer establishes that same decision would have been reached absent consideration of First Amendment rights); *see also Haskins v. Department of the Army*, 808 F.2d

1192, 1197 (6th Cir. 1987) (no Title VII *liability* if employer shows that same decision would have been reached absent any discrimination), *petition for cert. filed*, 55 U.S.L.W. 3714 (April 7, 1987).[3]

In short, the *Bibbs* standard that plaintiff urges us to adopt is inconsistent with Title VII's language, Supreme Court authority and this circuit's authority. Because the "but for" standard best addresses the issue posed by Title VII—McQuillen was rejected because of Cherney's superior qualifications, not because of his sex—we decline to adopt the *Bibbs* standard.[4]

B. *Sufficiency of District Court's Finding*

McQuillen next claims that the district court's finding that Cherney would have received the position absent any discriminatory motivation was clearly erroneous. This contention is not supported by the record.

A district court's findings of fact, particularly credibility determinations, are entitled to great deference on appeal.

[3] Some circuits have engrafted the First Amendment "mixed-motives" analysis contained in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977) onto Title VII disparate treatment claims and shift the burden of *persuasion* on the "but for" causation issue to the employer once an employee establishes that a prohibited factor entered into the employment decision. *See Haskins*, 808 F.2d at 1198; *Perryman v. Johnson Products*, 698 F.2d 1138, 1142 (11th Cir. 1983). This circuit has held that the burden of persuasion on the "but for" issue rests with the employee. *See Wheeler*, 794 F.2d at 1233 n.4; *Sherkow*, 630 F.2d at 502. Although these cases disagree as to whether the burden of persuasion should be shifted on the "but for" issue, there is agreement that no Title VII *liability* is established if the record shows that the same decision would have been reached absent the discriminatory motive. *See Haskins*, 808 F.2d at 1197-98.

[4] McQuillen also contended that he should be awarded attorney's fees under 42 U.S.C. § 2000e-5(k) because he established a Title VII violation under the *Bibbs* standard. Since we have rejected the *Bibbs* standard, we also reject his claim to attorney's fees.

Fed.R.Civ.P. 52; *Anderson v. City of Bessemer City*, 470 U.S. at 564, 573-76 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

By arguing that the district court's findings are clearly erroneous McQuillen simply wants us to replace the district court's evaluation of the evidence with his own partial evaluation. The record before us, however, amply supports the district court's determination that Cherney would have received the position absent any discriminatory motivation on the part of the defendants. Cherney was an honors graduate of the University of Wisconsin Law School with three years of experience at the National Labor Relations Board. She also had experience with the Wisconsin Employee Relations Commission, the Wisconsin Department of Justice and a law firm frequently utilized by WEAC. Moreover, the hiring procedures were generally the same procedures used to hire the fourth staff attorney, a male. While McQuillen was undoubtedly qualified for the position, he did not have Cherney's academic qualifications or her range of experience. McQuillen's entire argument rests upon the fact that staff attorneys recommended him for the position and that Krahn ranked him ahead of Cherney on the interview. These were only two out of many factors involved in the hiring process. Viewing all the evidence, the district court's finding that sex was not a "but for" factor is well supported by the record and is not clearly erroneous.

C. *Affirmative Action Policy*

McQuillen's final challenge is that the district court erroneously failed to declare WEAC's affirmative action plan unlawful under Title VII. Despite his failure to succeed on his hiring discrimination claim, McQuillen invites us to review the legality of the affirmative action plan with an eye towards awarding him the attorney's fees and costs incurred in "proving the illegality of the plan." We decline McQuillen's invitation.

In a disparate treatment case, the burden of persuasion on the issue of discrimination rests with the plaintiff at all times. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This includes the burden of proving that an affirmative action program is illegal—if the employer asserts that its hiring decision was made pursuant to an affirmative action program. *Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, ___, 107 S.Ct. 1442, 1449 (1987); *see also Wygant v. Jackson Board of Education*, 476 U.S. ___, ___, 106 S. Ct. 1842, 1848 (1986) ("[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program"). If, as in the present case, the employer claims that its hiring decision was based on the applicants' relative qualifications, not an affirmative action program, a plaintiff must first establish that the employer was acting pursuant to an affirmative action plan before the plan's validity is placed into issue. McQuillen did not satisfy this initial burden because he failed to establish that he was denied the position as the result of WEAC's "affirmative action" plan. The district court found that defendants hired Cherney because she was the most qualified person, not because her hiring was dictated by the "affirmative action" plan. Because McQuillen failed to establish a causal connection between the plan and his hiring claim—the only claim before us on appeal—there is no need for us to address the validity of WEAC's "affirmative action" plan.

We recognize that McQuillen also attempted to use the plan's mere existence as evidence of discrimatory intent even absent any causal connection between the plan and the hiring decision at issue. *Compare Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D. C. Cir. 1983) (court uses fact that employer was in process of adopting an affirmative action program as evidence of discriminatory animus against majority) *with Christensen v. Equitable Life*, 767 F.2d 340, 343 (7th Cir. 1985) (existence of *lawful* affirmative action plan may not be used as evidence of discriminatory motivation), *cert. denied*, 106 S.Ct. 885 (1986). Absent any

causal connection between the hiring decision and the plan, however, a favorable conclusion by the district court on this issue would give McQuillen nothing but cumulative evidence on the issue of intent. It would not entitle him to attorney's fees. Simply having a favorable statement of law in an order that denies all relief does not entitle a plaintiff to attorney's fees as a prevailing party. *Hewitt v. Helms*, ___ U.S. ___, ___, 107 S.Ct. 2672, 2676-77 (1987). Accordingly, we express no opinion on the validity of the plan except to note our agreement with the district court that, if left intact, it is certain to spawn much divisiveness and litigation in the future.

V.

CONCLUSION

For the reasons stated above, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—9-14-87—450

IN THE UNITES STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON E. McQUILLEN,

Plaintiff,

ORDER

v.

85-C-648-S

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, and MORRIS ANDREWS,

Defendants.

After a three-day trial to the Court in the above Title VII action, a decision was rendered from the bench dismissing plaintiff's complaint with costs. Summarily stated, plaintiff was not hired for the position sought because Melissa Cherney, a female, was more qualified than he. Although sex was a factor in defendants' decision not to hire plaintiff for the fifth Staff Counsel position, it was not a determining factor.

The plaintiff has now moved for a new trial and/or to amend judgment declaring the Affirmative Action Plan of defendant Wisconsin Education Association Council illegal and abolished. Plaintiff reasons that if the Court should so decide, it must then follow that the Plan caused plaintiff to be rejected, and bias on the basis of sex then becomes the determining factor. Accordingly, plaintiff wins! This novel reasoning carries with it the same logic that had plaintiff not been misled by false advertising he would not have purchased the motor vehicle which he was driving when rear ended by an uninsured motorist. Accordingly, the auto dealer is liable, because he should not have sold vehicles pursuant to an illegal plan.

Were the Court inclined to follow this imaginative scenario, it certainly could do so without the necessity of another three-day trial. Plaintiff has shown creativity, but insufficient reason for its primary request, and its motion for a new trial is denied.

The Court will, however, more extensively address plaintiff's alternate request.

The language to which plaintiff objects is set forth in Exhibit 69, entitled "Affirmative Action Plan" and states in part thereof as follows:

> A serious systematic search shall be made for minority persons to fill WEAC staff vacancies until such time as the ratio of minority persons on the staff reflects the proportion of minority personnel governed by WEAC.

The Court is now asked to determine its meaning.

Here is what defendant Donald E. Krahn though it meant.

> Gordon would very much like to be a WEAC Staff Counsel. Our affirmative action program would require us to search for a qualified woman, if we were to create a fifth attorney position. Thus, his chances for employment here are very limited. It would be a genuine loss for all of us if he had to leave Wisconsin in order to find a permanent position in teacher labor relations. H will make a very good employe.

Exhibit 46, letter to Southwest Teachers United, dated June 30, 1986.

Defendant Morris Andrews appears to know little about the policy which he drafted, and states in Exhibit 112 as follows:

> It is my understanding of our policy that we will hire qualified minority and women until we have proportionally at least the number of staff that we have members. I do not mean a reverse quota

> system. However, I believe that at the minimum, it can be said that the UniServ hiring standard is only to employ women and/or minorities if they are judged by the local hiring committee to be the "most qualified" job applicant. I do not believe this is the policy or its intention?

The Court in its decision from the bench indicated it, too, did not know the Plan's meaning. It is now called upon by plaintiff to not only interpret the language of that Plan, but to declare it to be illegal.

There is no question that the portion of the Affirmative Action Plan to which plaintiff objects is confusing, ambiguous, and not even understood by those who are supposed to administer it. This form, however, does not necessarily make it illegal. To determine the success of plaintiff's alternate motion,

the Court must examine the Plan in light of United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), where at page 208 thereof the Court, in fact of a well reasoned dissent, states:

> We therefore hold that Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.
>
> III
>
> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line.
>
> * * *

In discussing the plan at greater length, the court continues:

> The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

The Weber court concluded,

> that the Kaiser-USWA plan fell within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.

This Court further found in its decision from the bench that the amendment adopting the controversial language of the Affirmative Action Plan was encouraged by the National Education Association (NEA). The Court, when

examining the plan in light of Weber, found it did not relate to any appropriate labor market, nor was it based upon the need to remedy past discrimination or because of statistical disparity. The Plan appears to be based on the desire to increase the number of females and minorities on the WEAC staff to reflect the current membership of WEAC, of which 58 to 62 percent are female and minority.

The Court can find no reason in the record for the controversial language other than a request from the NEA. Perhaps the desire is similar to that of the National Boy Scout Council or Girl Scout Council suggesting that all staff are to be male or all female to reflect the 100 percent male or female membership in each organization. Were this a mandate rather

than a suggestion, the Court would readily determine such Plan not to fall "on the permissible side of the line." If in the case presently before the Court, "search" were to have been "hiring," and "for minority" changed to "of minority," to read as follows:

> A serious systematic hiring shall be made of minority persons to fill WEAC staff vacancies . . .

the Plan would not fall on the "permissible" side of the line.

WEAC's affirmative action plan further provides, however, at item 1, as follows:

> Consciously screen qualified applicants for staff positions from members of minority as well as majority groups.

In light of the teachings of the United States Supreme Court in Weber, it would appear that even a plan less artfully

drawn than this one may not be condemned. Its provisions, however confusing and misleading, probably do not reflect a private, voluntary, minority conscious plan which would be condemned by the majority. In spite of the view held by this court, it would appear in light of Weber that the Plan somehow passes muster and barely falls on the permissible side of the line. To "search" is not to "hire," and although the Court is of the opinion that the Plan serves no useful purpose except, of course, to spawn the type of litigation presently before the Court, nonetheless this private, voluntary, minority conscious affirmative action plan which serves perhaps no useful purpose other than to appease NEA cannot be found by this Court to fall on the impermissible

side of the line. This Court's reasoning is buttressed in Christensen v. Equitable Life Assurance Society of the United States, 767 F.2d 340 (7th Cir. 1985) p. 343:

> The only evidence of discriminatory intent which Christensen was able to offer was the fact that Equitable has an affirmative action program which seeks to recruit black employees for executive positions. But, as the Parker court noted, a lawful affirmative action program is not evidence of discrimination against the majority, Parker, supra, at 1017 n. 9. National policy permits the use of voluntary affirmative action programs to remedy the legacy of discrimination. For the court to discourage the use of such programs by treating them as evidence in themselves of the very discrimination they are designed to eradicate would be improper. The fact the Equitable had such a program is not evidence of discrimination.

Emphasis added.

There is some logic in plaintiff's position here, as illustrated in Justice Rehnquist's dissent in Weber concerning the literal meaning of the Title VII language. The Court must conclude, however, that both Weber and Christensen stand for the proposition that recruitment of minority candidates is lawful so long as the hiring decision itself is unbiased.

There is also before the Court defendants' motion for attorneys' fees, which motion must be granted for those appropriate fees which relate to the dismissal of plaintiff's first and second claims of his amended complaint. The Court will allow defendants to advise the Court, not later than May 12, 1986, of those fees which they believe to be reasonable for the dismissal of these two

claims. Plaintiff may have until May 19, 1986 for his response.

The Court may at the time of award expand upon remarks set forth at pages 4 and 5 of its December 16, 1985 order.

Accordingly,

ORDER

IT IS ORDERED that plaintiff's motion for a new trial and/or to amend judgment is DENIED

IT IS FURTHER ORDERED that defendants' motion for the award of attorneys' fees is PARTIALLY GRANTED for the dismissal of plaintiff's first and second claims.

Entered this 2nd day of May, 1986.

BY THE COURT:

/s/
JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE
United States District Court
Western District of Wisconsin

Gordon E. McQuillen,
Plaintiff,

Docket Number 85-C-648-S

v.

Judge John C. Shabaz

Wisconsin Education Association Council, et al.,
Defendants.

_____ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the Court with the judge (named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

---

that judgment is entered in favor of the defendants dismissing plaintiff's complaint with costs and prejudice.

CLERK
/s/ Joseph W. Skupniewitz Feb 28, 1986

Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-999

In The
Supreme Court of the United States
October Term, 1987

GORDON E. McQUILLEN,

Petitioner,

v.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN and MORRIS ANDREWS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The February 27, 1986 Findings of Fact, Conclusions of Law and Decision of the District Court appear in respondents' appendix at App. 3 through App. 15.

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STATEMENT OF THE CASE

The Petition as a whole, and in particular its Statement of the Case and Questions Presented, is incomplete, inaccurate and misleading in several important respects. We will supplement, correct and clarify as necessary.

Petitioner McQuillen worked as a law clerk at WEAC continuously since his first semester in law school in 1978. He graduated from law school in December, 1980 and was admitted to the Bar in January, 1981. He continued to work for WEAC under the title of Attorney-Clerk following his admission to the Bar and at all times material hereto. McQuillen challenges respondents' failure to hire him for the staff counsel position in the fall of 1982. Petitioner neglects to note that less than a year earlier, respondents also failed to hire him for an earlier staff counsel position, and instead hired a more qualified white male. When McQuillen approached Donald Krahn, WEAC's Director of Legal Services, to discuss the reasons why he was not chosen for the earlier staff position, Krahn advised McQuillen that his failure to secure any legal experience outside of WEAC was hurting him and that McQuillen should get outside legal experience. McQuillen did not do so.

The person ultimately hired for the staff counsel position now in dispute, Melissa Cherney, had been employed

as an attorney or law clerk at the National Labor Relations Board, the Wisconsin Employment Relations Commission, the Wisconsin Department of Justice and at a law firm which performed legal services for WEAC. She also graduated with honors from law school. Because respondent is a labor organization, such experience was particularly desirable. Throughout the trial, respondents contended that Cherney was hired because of her superior qualifications. At no point did respondents contend that she was hired pursuant to any written affirmative action plan.

Following a three day trial on the merits, the District Court issued its Findings of Fact, Conclusions of Law and Decision from the bench on February 27, 1986.[1] The District Court concluded that while the Executive Director Andrews may have had a predisposition to hire a qualified woman or minority if one was available, Cherney was obviously more qualified than the plaintiff and that although sex was a "factor" in the hiring decision, it was not "a determining factor".

Contrary to petitioner's statement, Krahn did not determine that the three finalists for the position were "equally qualified". In fact, Krahn simply did not rank the finalists. According to the Trial Court, Andrews "easily" determined that Cherney was the superior applicant. The Court stated:

> "Now, since Morris Andrews has easily rated Melissa Cherney superior to the plaintiff, and because this

[1] Petitioner failed to include the stenographic record of Judge Shabaz' Findings of Fact, Conclusions of Law and Decision in his Petition/Appendix. Respondents have included it in their Appendix, at App. 3.

> Court also finds that Ms. Cherney is better qualified than Mr. McQuillen, there is no factual support for the plaintiff to be appointed to the position despite a subjective in quotes (sic), "subjective" attitude found to be present in the selection by Mr. Andrews."

The Court also stated:

> "The Court has found and does conclude that Ms. Cherney was more qualified that Mr. McQuillen. The Court believes that the determination of Mr. Andrews on that score was correct even though there was that predisposition.
>
> For there to be any recovery the lost position must be traced to the defendant's discriminatory acts and not to a legitimate non-discriminatory decision to hire one better qualified for the position. And the Court finds that that legitimate articulation is not pretextual in nature."

At no point in its February 27, 1986 bench decision did the Court say that sex was a "motivating" factor. The Court stated that Andrews' interest in hiring a female was in the nature of a "predisposition".

The District Court noted that the petitioner's reliance on the recommendation of the other staff attorneys at WEAC was of little importance since they were personal friends and since most of them recommended McQuillen prior to interviewing any of the other finalists.

Subsequent to the bench decision and judgment, petitioner filed a Motion For New Trial and/or To Amend Judgment.[2] The new trial was sought to litigate the legality of WEAC's affirmative action plan. Petitioner asked the Court to amend its judgment in the following respects, *inter alia:*

[2] Respondents have included said Motion in their Appendix, at App. 16.

"3. That the Affirmative Action plan of WEAC (Exhibit 69) was a determining factor in causing the sex of the plaintiff to be a motivating factor in WEAC's decision to reject his application for employment in the fifth staff counsel petition and that plaintiff is entitled to reasonable attorneys' fees and costs with respect to this finding;

• • •

5. That the Court reconsider its finding of fact that the sex of plaintiff was not a determining factor in WEAC's decision to reject his application for the fifth staff counsel position;"

It was in response to this Motion that the District Court issued the Order dated May 2, 1986, included in petitioner's Appendix. The Court denied the Motion, finding no causal relationship between the affirmative action plan and respondents' employment decision. Despite petitioner's specific Motion for such a finding, the Court again refused to find that sex was either a "determining" factor or a "motivating" factor in the hiring decision. The Court did, however, in dicta, discuss the legality of WEAC's affirmative action plan. It concluded that the written plan itself, in conjunction with Krahn and Andrews' own confusion about what, if anything, the plan meant, was very confusing and deficient, but not illegal.[3]

The Court of Appeals concluded that there was no need to address the legality of the affirmative action plan because McQuillen failed to establish any causal connection between the plan and the hiring decision. The

[3] Contrary to petitioner's repeated statement that the Court found the plan deficient *inter alia* because it contained no time limitations, the Court made no such finding.

Court of Appeals concluded that, absent the causal connection, even a favorable conclusion of law on this issue would not entitle McQuillen to the attorney's fees he was seeking.

The Court of Appeals also concluded that the record "amply supported" the District Court's findings. Thus, the Court of Appeals upheld the District Court's conclusion that petitioner had failed to prove that his sex was a determining factor in his not being hired as staff counsel.

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REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED REGARDING THE ISSUE OF THE MT. HEALTHY CAUSATION STANDARD BECAUSE RESOLUTION OF THIS ISSUE WILL HAVE NO BEARING ON THE OUTCOME OF THIS CASE.

The petitioner seeks certiorari for the purpose of estabiishing the appropriate standard of causation for determining liability in a Title VII case. The discussion of the "but for" causation standard by the Court of Appeals is consistent with decisions dealing with that causation standard by all Circuit Courts that have addressed this issue, except the 8th Circuit. More importantly, the 7th Circuit's decision is consistent with statements made by the U. S. Supreme Court in prior decisions. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) and the Supreme Court's analysis in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). The Court very recently denied certiorari in at least one other mixed motive

case in which the lower Courts determined that the but for causation standard should be applied at the liability stage, rather than just the remedy stage. *Haskins v. Department of the Army*, 808 F.2d 1192 (6th Cir. 1987), petition for cert. denied, 56 U.S.L.W. 3242 (October 6, 1987).

The only case cited by the petitioner in support of his position is *Bibbs v. Block*. *Bibbs v. Block* is a recent decision by the 8th Circuit attempting to formulate a unique application of the but for standard of causation in mixed motive cases. The *Bibbs* case generated three different concurring opinions and a dissent joined by three judges, reflecting disagreement as to the reasoning applied. The defendants in *Bibbs*, the U. S. Department of Agriculture and its Secretary, did not file a petition for certiorari. While the 8th Circuit's preliminary analysis appears to differ from that of other Circuits, it would be premature to evaluate what if any impact such an analysis will have. This situation hardly constitutes a conflict sufficiently developed or significant to be worthy of review at this time.

Moreover, resolution of the theoretical issue of whether the but for causation standard should be applied at the liability stage or the remedy stage will have no impact on the results of this case. Even the proponents of the *Bibbs* theory acknowledge that the existence of discriminatory conduct must be proven by the plaintiff under the *McDonnell-Douglas* test before the dual motive analysis is warranted. Under the *Bibbs* theory, there is no reason to engage in the but for examination unless and until plaintiff proves that discriminatory conduct occurred. In this case, plaintiff failed to sustain the burden of showing

that sex was a motivating or a determining factor in respondents' conduct.

The District Court ruled very emphatically that Melissa Cherney was easily rated as better qualified than petitioner and that her superior qualifications were the basis for her being hired for the position. The Court did find that sex was a "factor" in the decision not to hire the plaintiff; however, it was not "a determining factor". The Court then clarified that the factor it was referring to was manifested by the subjective attitude of Morris Andrews. The Court, however, found Mr. Andrews' conduct in hiring Ms. Cherney to be correct "even though there was that predisposition". Finally, the Court stated that for there to be any recovery "the lost position must be traced to the defendant's *discriminatory acts* and not to a legitimate non-discriminatory decision. . . ." (Emphasis added)

The point is that even under *Bibbs*, a defendant is not found liable under Title VII merely on the basis of his opinions or predispositions. He can only be found liable on the basis of *conduct*, i.e. *acting* on the basis of impermissible bias. Inviting the Court to impose liability on the basis of a determination that an employer harbors discriminatory attitudes or thoughts without requiring a showing that such thoughts or attitudes were operative or that they motivated conduct is to invite the Court onto a slippery slope that would send the First Amendment and Title VII on a collision course.

In this case, the District Court did not find sex to be a "motivating" factor as asserted by petitioner. Indeed, the Court found that sex was not even "*a* determining factor" in the decision. The but for test would require

sex to be *the* factor that triggers the complained of conduct. The Court's finding of fact that sex was not "*a* determining factor" shows that it was not operative in triggering conduct. This, coupled with the Court's articulated distinction between "discriminatory acts" and "predispositions" demonstrates that the record herein does not support classifying this case as a "mixed motive" case giving rise to the cause issue dealt with in the *Bibbs* and *Mt. Healthy* analyses.

The fact that the District Court explicitly denied the post trial motions brought by petitioner to modify the Court's judgment, especially with respect to sex not being *a* determining factor in WEAC's decision, demonstrates that the Court did not choose its words inadvertently in this regard. The Court was looking for discriminatory *conduct* rather than thoughts or predispositions. It found no such *conduct*. The Court of Appeals concluded that the record "amply supports" the District Court's determination.

The District Court found that Cherney was hired because she was more qualified than the plaintiff. The Court of Appeals, after a thorough review of the record, concluded that the record "amply supports" the District Court's determination. Thus, even if the 7th Circuit had been willing to apply the 8th Circuit's approach in *Bibbs*, the Court would never have reached the issue of remedy because petitioner failed to prove liability by failing to prove that respondents' contention that Cherney was more qualified was pretext or that discrimination occurred. Petitioner is now attempting to pick and choose from different legal paradigms so as to prevail on some legal issue in order to recover attorneys fees.

II. REVIEW OF PETITIONER'S SECOND QUESTION CONCERNING BURDEN OF PERSUASION SHOULD BE DENIED BECAUSE REGARDLESS OF THE LAW ON BURDEN OF PERSUASION, RESPONDENTS IN FACT ASSUMED AND MET THE BURDEN AT TRIAL AND PROVED THAT DISCRIMINATION WAS NOT A MOTIVATING FACTOR.

The burden of proof allocation is a function of the Trial Court subject to appellate review. In this case, the District Court made no comment about burden of proof, and burden of proof was not at issue during the trial. Indeed, the petitioner did not address any burden of proof concerns in his post trial motions and he did not cite any burden of proof issue as his basis for appeal to the Court of Appeals.

The Court of Appeals did discuss the "burden of persuasion" in a footnote. Petitioner now seeks Supreme Court review of an issue which was not in dispute in the lower Courts by focusing upon the footnote and misstating the legal issue.

Petitioner asks the Court to decide "whether the plaintiff or the defendant has the burden of persuasion on the 'but for' issue *once the plaintiff proves that discrimination was a motivating factor in the employment decision*" (emphasis added). Petitioner's statement of this question presumes a condition which does not exist because it was not established at trial. Thus, petitioner asks the Court to resolve an academic issue with no bearing on this case.

At trial petitioner did not prove that "discrimination was a motivating factor in the employment decision". As discussed above, despite petitioner's specific request to

do so, the District Court refused to find that discrimination was either a "motivating" or "determining" factor in the hiring decision.

Petitioner, by inserting the word "motivating" into its Statement Of The Question, its Statement Of The Case and its Argument, has significantly mischaracterized the factual and legal issues involved. Both the District Court and the Court of Appeals determined that the "determinative", i.e. motivating, factor for respondents' hiring of Melissa Cherney was her superior qualifications.

Even if the Court were to choose to consider this abstract issue and were to conclude that the Court of Appeals erred in stating the burden of proof, such error would be harmless. As the Court of Appeals' careful review and description of the record demonstrates, respondents did *in fact* assume the burden of proving Cherney's superior qualifications. As the Court of Appeals summarized, respondents proved that:

> Cherney had excellent academic credentials, graduating with honors from the University of Wisconsin Law School. Her professional experience was diverse and well suited to WEAC's needs. Prior to applying for the position, Cherney had worked as a lawyer for three years with the National Labor Relations Board. She had also had clinical and clerkship experience with the Wisconsin Employment Relations Commission, the Wisconsin Department of Justice, and a law firm utilized by WEAC.

It was also proven that McQuillen had no outside legal experience since he had clerked continuously at WEAC since his first semester of law school and that he had a mediocre law school record. Respondents proved that

Krahn, head of WEAC's legal department, advised McQuillen, after WEAC failed to hire McQuillen for a staff position in 1981 (for which a better qualified white male was hired), that he should get outside legal experience if he wanted to establish his qualifications for a future staff counsel position.

The issue of who had the burden of persuasion was not an issue before the Trial Court nor before the Court of Appeals. Now petitioner seeks Supreme Court review because of a comment made by the Court of Appeals in a footnote. At trial, petitioner offered no evidence to rebut the fact of Cherney's superior academic and professional experience qualifications. Petitioner offered no evidence to rebut the fact of his own lesser academic and professional experience qualifications. Whatever comment was made by the Court of Appeals in a footnote, at trial the respondents more than carried the burden of proof in showing that their reason for hiring Cherney was her superior qualifications.

III. CERTIORARI SHOULD BE DENIED REGARDING THE AFFIRMATIVE ACTION PLAN BECAUSE THE RULINGS OF THE LOWER COURTS WITH RESPECT TO THIS ISSUE WERE NOT CLEARLY ERRONEOUS.

Petitioner asks the Court to review the legality of an affirmative action plan and find it illegal as a matter of law. The Court should deny this request. The District Court found, and the Court of Appeals affirmed, that the affirmative action plan was not causally related to the employment decision taken. Hence, there is no reason to review the plan because it is immaterial to the outcome of the case. The District Court evaluated the actions, state-

ments and possible motives of Donald Krahn and Executive Director Morris Andrews with regard to the affirmative action plan. The District Court expressly found that Cherney was hired because of her superior qualifications and not pursuant to the affirmative action plan.

In denying petitioner's motion for a new trial concerning the legality of the affirmative action plan, the Court summarily rejected petitioner's apparent belief that a mere finding that the plan was illegal would establish the causal link necessary to petitioner's success. The Court did, however, go on in what is essentially dicta to evaluate the plan.

While the District Court found WEAC's affirmative action plan to be inartfully drawn and confusing, it found that said plan related to the "searching" or recruitment of a broad spectrum of candidates and did not mandate *hiring* any particular candidate on a preferential basis. Indeed the affirmative action plan also contains the following statement:

> "WEAC managers shall:
>
> * * *
>
> B. recruit, hire and promote in all position classifications without regard to . . . sex."

Since the affirmative action plan did not mandate or require that preference be given with respect to hiring or promotions or other terms of employment on the basis of sex or any other impermissible basis and since WEAC never claimed that said plan was the basis for Cherney being hired, the plan had no determinative relevance in this case. Furthermore, the Court concluded that Krahn's recommendation letter was not a reference to a plan mandating the hiring of a female, but rather a statement indicating that the increased competition generated by a search for minority candidates would sharply reduce McQuillen's chances of hire, just as it had done when the former vacancy was filled.

The determination of what role, if any, an affirmative action plan played in an employment decision is a matter of fact. Both Krahn and Andrews testified about their reasons for hiring Cherney and declining to hire McQuillen. They also testified about their understanding of the plan, and the role it did or did not play in their employment decisions. Despite petitioner's specific request in his motion for a new trial that the Court find the affirmative action plan to be a determining factor in the hiring decision, the District Court concluded that the affirmative action plan was not causally related to the hiring decision.

Such a finding is a finding of fact under Fed. R. Civ. P. 51(a) and cannot be overturned unless clearly erroneous. *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 573 (1985). A Trial Court's finding of discriminatory intent, or lack thereof, can only be overturned if clearly erroneous. *Batson v. Kentucky*, 476 U.S. — [106 S. Ct. 1712, 1742, N. 21 (1986).]

The Court of Appeals correctly declined McQuillen's request to review the legality of the affirmative action plan. The Court characterized that request as a mere hope that McQuillen would be awarded attorney's fees if he could prevail on some legal issue.

To the extent that petitioner alleges that the burden and allocation of proof issues relate to the issue of the

affirmative action plan, he is in error. As the Court of Appeals correctly reasoned, if an employer asserts that a hiring decision was made pursuant to an affirmative action plan, then the plaintiff has the burden of proving the illegality of the plan. *Johnson v. Transportation Agency, Santa Clara County*, — U.S. —, 107 S. Ct. 1442, 1449 (1987). If the employer asserts that its hiring decision was based on some other factor, e.g. superior qualifications, then a plaintiff who wants to challenge the legality of an affirmative action plan must first establish that the employer was actually acting pursuant to the plan. Under either scenario, the plaintiff has the burden of proof. Here, the petitioner failed to establish the causal link at trial, then failed on a post judgment motion to convince the Court the plan was either a motivating or determinating factor in the hiring decision, and then failed to convince the 7th Circuit to reverse on this issue.

—o—

CONCLUSION

The District Court evaluated both the actions and motives of respondents in hiring Melissa Cherney rather than the petitioner. After evaluating the testimony, including the intent and credibility of Donald Krahn and Morris Andrews, the District Court concluded that respondents hired Cherney because she was more qualified. In response to petitioner's post-judgment motion to find either sex or the affirmative action plan a "determining" or "motivating" factor in the hiring decision, the District Court declined to do so.

The 7th Circuit held that the District Court's findings were amply supported by the record. Petitioner has failed to show that any of the District Court's material findings of fact are clearly erroneous. Instead he seeks review for the purpose of deciding legal issues with no bearing on this case. Therefore, the Court should deny the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted this 13th day of January, 1988.

KELLY AND HAUS
/s/ WILLIAM HAUS
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No. 87-999

In The

Supreme Court of the United States

October Term, 1987

GORDON E. McQUILLEN,

Petitioner,

v.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN and MORRIS ANDREWS,

Respondents.

APPENDIX OF THE RESPONDENTS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN AND MORRIS ANDREWS

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PETITIONER'S POST TRIAL MOTION ..... App. 16 - App. 18

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON E. McQUILLEN,

Plaintiff,

vs.

Case No. 85C648S

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, Director of Legal Services Division of WEAC, and MORRIS ANDREWS, Executive Director of WEAC,

Defendants.

(Filed April 23, 1986)

STENOGRAPHIC TRANSCRIPT of the Court's Findings of Fact, Conclusions of Law and Decision, in the above-entitled matter, held before the Honorable JOHN C. SHABAZ, on the 27th day of February, 1986, at Madison, Wisconsin.

APPEARANCES

Fox, Fox, Schaefer & Gingras, S.C., 44 East Mifflin Street, Madison, Wisconsin, by A. STEVEN PORTER and ROBERT J. GINGRAS, appeared on behalf of the Plaintiff.

Kelly, Haus & Katz, 121 East Wilson Street, Madison, Wisconsin, by STEPHEN G. KATZ and WILLIAM HAUS, appeared on behalf of the Defendants.

BARBARA L. LAZARIS, Official Court Reporter
120 North Henry Street, Room 120
Madison, Wisconsin 53703
(608) 255-3821

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Court's Findings, Conclusions and Decision—page 3

(p. 3) (5:23 P.M.)

THE COURT: The Court at this time will issue its Findings of Fact and Conclusions of Law with the understanding that it reserves the opportunity to supplement its remarks, if indeed it considers that to be appropriate.

As to the Findings of Fact, the plaintiff, Gordon E. McQuillen resides at 950 South Midvale Boulevard, Madison, and Dane County, Wisconsin; and has been employed by the defendant, WEAC, since November 2 of 1978, and is presently working part-time as a Uniserv director.

The defendant, Wisconsin Education Association Council WEAC, is a labor organization representing more than 42,000 teachers and other school employees in Wisconsin, with a staff of 64 employees with offices in the principal place of business located at 101 West Beltline Highway, Madison, Dane County, Wisconsin; and is engaged in an industry affecting commerce. Membership of the organization, WEAC, is between 58 to 62 percent female and minority members. The WEAC staff is 42.5 percent female. The defendant's legal department employs professional staff counsel of six: Four male and two female attorneys who represent WEAC local affiliates and individual members. The legal department also em-

ploys law clerks who are either law students or recent law school graduates licensed to practice law.

The defendant Morris Andrews resides at 4200 Karmichael (p. 4) Court, Madison, Dane County, Wisconsin, and is executive director of WEAC.

The defendant Donald Krahn resides at 431 East Milwaukee Avenue, Ft. Atkinson, Jefferson County, Wisconsin; and is the director of the Legal Services Division of WEAC.

On January 23, 1984, plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission, and on April 17, 1985, received a notification of his right to sue, commencing this action on July 17, 1985.

The plaintiff graduated from law school, December of 1980, and was admitted to the practice of law in Wisconsin in January of 1981, after which he continued to work under the title of attorney-clerk, which position, which is not included in a collective bargaining unit. During his WEAC employment, Mr. McQuillen performed competently and his legal skills were viewed with high regard by his co-workers, supervisors and Mr. Krahn who recommended his employment with the Southwest Teachers United on June 30, 1982, as follows: "Gordon would very much like to be a WEAC staff counsel. Our Affirmative Action Program would require us to search for a qualified woman, if we are to create a fifth attorney position. Thus his chances for employment here are very limited. It would be a genuine loss for all of us if he had to leave Wisconsin in order to find a permanent position

in teacher-labor relations. He will make a very good employee."

(p. 5) On or about October 19, 1982, WEAC posted for a new staff counsel position. That would be the fifth position. That posting was until March 1 of 1983. Ms. Rubin, a candidate for this position, left the employ of WEAC during this period. The plaintiff applied for this position on November 3 of 1982 and his application was not acknowledged.

On March 1 of 1983 WEAC posted and advertised for applicants for an Attorney 1 position. This is an entry level position. This was an external posting, an open posting. The Court is of the opinion and finds that 66 applicanfs expressed interest, of which 12 were selected for further consideration, to include the plaintiff. And, this was the same position for which posting was previously internally made. Interviews were conducted of those finalists who remained. Three—plaintiff, and two females, Melissa Cherney and Jackie Kineman, were recommended by Mr. Krahn as the finalists for this position, to Mr. Andrews who selected Ms. Melissa Cherney, a female, who accepted the offer on June 22 of 1983 and now fills this position.

All four staff counsel, Priscilla MacDougall, Steven Pieroni, Michael Stoll and Bruce Meredith recommended to Mr. Krahn that the plaintiff be hired. MacDougall, Pieroni and Stoll made this recommendation initially as soon as the position was made available and before all of the applications and the candidates' interviews were taken. Meredith (p. 6) made this recommendation of the plaintiff after the candidates' interviews.

The plaintiff was interviewed for the position during the week of May 23, 1983, by Messrs. Krahn, MacDougall, Pieroni and Stoll.

The successful candidate, Melissa Cherney, was also interviewed. She had some difficulty with the interview. Plaintiff did better. Ms. Cherney had a better academic record than plaintiff, having graduated with Distinction. She had better recommendations or references, those being from Cheryl Weston of the law offices of Cullen & Weston, June Miller-Weisberger, who is a professor at the University of Wisconsin and who had Ms. Cherney in her class, and a member of the National Labor Relations Board who supervised the employment of Ms. Cherney during a period of approximately two years. She also received satisfactory ratings from the NLRB, which were included in her application and resume.

The Court further finds that the successful applicant, Melissa Cherney, had a wider variety of employment, a more diverse employment, although a perhaps positions of limited responsibilities, no less limited than perhaps did the plaintiff. Those work experiences being at the National Labor Relations Board, the Wisconsin Employment Relations Commission, the Department of Justice, and the private law firm of Cullen & Weston.

(p. 7) The plaintiff had more experience with WEAC and did better than did candidate Cherney on the interview.

The Court will also indicate that the plaintiff had the recommendations of staff of all four staff counsel.

The next finding relates to this Court's determination that Mr. Krahn advised Mr. McQuillen in June of 1983

that he was under a great deal of pressure to hire a female for the position. He further advised Stoll, Pieroni and Meredith that he preferred to fill the position with a female.

The selection procedure and the appointment of attorney position that we are presently discussing—which the Court calls Position V—differed from past practices in that Mr. Andrews was not only responsible for the final decision but indeed made the final decision with recommendations made to him only by Mr. Krahn. Mr. Krahn provided Mr. Andrews a brief memorandum concerning the three finalists. The memorandum referred to Melissa Cherney, Jackie Kineman, and the plaintiff, Gordon McQuillen. Although Mr. Andrews did not examine the individual files of the three finalists, nor did he interview them, he did make two reference calls: One to a Mr. DeMars on behalf of Ms. Kineman, and one to an NLRB officer on behalf of Ms. Cherney. He further discussed the qualifications with Mr. Krahn on a limited basis and the Court finds he did examine the vita for each of the candidates together with the contents of the memo. He also considered (p. 8) his own knowledge of the plaintiff's work experience.

The memo specifically advised that all of the candidates are well qualified and the choice is difficult. Any reservations that Mr. Krahn may have had concerning the plaintiff were not communicated to Mr. Andrews. The memorandum has been received into evidence and does indeed recite the principal qualifications of the three finalists.

Some time between June 10, 1983 and June 23, 1983, Mr. Andrews advised Mr. Krahn to hire the woman from Milwaukee. Ms. Cherney was appointed on June 22nd of 1983. Several days prior to that on June 17th and 18th, the WEAC board of directors amended its Affirmative Action Plan to include the paragraph 9(b) as follows—*b* had previously been included in the original plan, but they amended 9(b) as follows: A serious systematic search shall be made for minority person to fill WEAC staff vacancies until such time as the ratio of minority persons on the staff reflects the proportion of minority personnel governed by WEAC. This provision is further defined to include females. The definition of "minorities" does include "females." The amendment was drafted and prepared by Mr. Andrews and was adopted by the board at its June 17, 1983 directors' meeting.

Some time in 1983 Mr. Andrews advised Charles Garnier, a WEAC employee who he directly supervised, that two Uniserv units should hire a woman director or a serious chance existed (p. 9) further funding would not be received. Andrews was urged and advised by the National Education Association, NEA, the national organization for WEAC, to adopt practices regarding the hiring and promotion of minority and female applicants, which Mr. Andrews believed to be a request for an illegal quota system which he determined would not be followed.

The Affirmative Action Plan, however, to which this Court has referred as being amended by June 17th and 18th of 1983, was an amendment which was created and adopted by WEAC because of encouragement from NEA. It did not, does not appear to be related to any appropriate

labor market, nor does it appear to be based either on the need to remedy past discrimination or because of any statistical disparity. It appears to be based on the desire to increase the number of females and minorities on the WEAC staff from the current 42.5 percent to something between 58 and 62 percent.

The Court is as confounded with the memorandum of September 2, 1982, prepared by Mr. Andrews as is Mr. Krahn. The Court has read that paragraph on page 2, from the first time it was brought out of the pocket of Mr. Garnier, when he testified on the witness stand, about one week ago. And Mr. Krahn was asked what does it mean. And he said he didn't know. And the Court would indicate it doesn't know either. The Court would expect something better from an educational association such as this. It reads as follows: "It is my (p. 10) understanding of our policy that we will hire qualified minority and women until we have proportionally at least the number of staff that we have members. I do not mean reverse quota system. However, I believe that at a minimum it can be said that the Uniserv hiring standard is only to employ women and/or minorities if they are judged by the local hiring committee to be the most qualified job applicant. I do not believe this is the policy or its intention." Do you, as the board of directors, believe that this is the policy or its intention? The Court would be interested to learn the response.

But, in any event, that did appear to be ambiguous policy which was followed by the WEA on September 2 of 1982, and it was further amended on June 17 of 1983, as the Court has previously referred to those minutes which adopted this subsequent policy by the board of directors.

The Court must find at this point that sex was a factor in the decision of the defendants not to hire the plaintiff. It was not, however, a determining factor because the successful candidate, Melissa Cherney, was more qualified than the plaintiff.

As it relates to the claim for retaliation, WEAC law clerks were not eligible for, nor did they receive, group health insurance coverage before June 10, 1983. Plaintiff waived his right to any such coverage on June 23, 1983, (p. 11) refusing the plan which was offered. The law clerk, Shaune Curry, on December 6, 1984, and William Sample (ph), February 28, 1985, individually negotiated with Mr. Krahn for health and dental insurance benefits at the expense of WEAC. Because Mr. McQuillen did not require or need those benefits he then attempted without success to do his own negotiations. He wished to negotiate a wage increase by an amount equivalent to the cost of insurance coverage. This was rejected. The Court believes that this was an attempt at individual collective bargaining, individual negotiation which failed.

The Court would make the following conclusions of law: Prima facie case of sex discrimination under Title VII has been made. Mr. McQuillen is a member of a protected class under Title VII. He is a male. He applied for employment for which he was qualified, the position of staff attorney with WEAC, for which he had the necessary qualifications. He was not hired and Melissa Cherney, a person of the opposite sex, was hired. The Court concludes that from the very beginning a struggle began. Fellow staff members rallied around Mr. McQuillen. They wanted the plaintiff to obtain that position. Three of the

existing counsel cared not about who else may be applied or what qualifications those folks may have had. Mr. Meredith, at least before he rallied around the flag, made the determination that he would examine the qualifications of the other applicants and did (p. 12) attempt to make some even-handed determination as to who he believed to be the most qualified. The Court, however, finds this to be regardless of the well-intentioned motives, a ridiculous hiring procedure in which the employees themselves select their fellow employees, an abdication of management's responsibility. And, that, coupled with the ambiguous policy perceived by WEAC to hire minorities and women, created a disaster that—well, again it seems to be the personal determinations of those folks who are involved in the process, and I suppose they should be saddled with either benefits and detriments of the particular programs and procedures which they wish to follow.

Mr. Stoll was clearly just didn't want to reject a friend again. He had difficulty enough when the rejection was made from the hiring of Mr. Pieroni and he sure didn't want that to happen again. I believe the staff employees failed to have the objectively necessary to determine the qualification of those folks who applied, particularly as a result of their close relationship with Mr. McQuillen. That, of course, doesn't excuse the conduct of Mr. Krahn and Mr. Andrews. There is no question they had that predisposition as well. They were going to attempt to find a female employee to obtain this job or a minority, perhaps even regardless of those qualifications which the applicants may have had.

(p. 13) Mr. Krahn was under a great deal of pressure and he decided he would take care of the hot potato by

making three recommendations to Mr. Andrews, indicating that the counsel, the staff counselors thought Mr. McQuillen was indeed qualified, and he will let that decision be made by Mr. Andrews.

Now, since Morris Andrews has easily rated Melissa Cherney superior to the plaintiff, and because this Court also finds that Ms. Cherney is better qualified than Mr. McQuillen, there is no factual support for the plaintiff to be appointed to the position despite a subjective in quotes, "subjective" attitude found to be present in the selection by Mr. Andrews.

The Court will refer you to *Rogers v. Equal Opportunity Commission* in which the court has extracted some of the language from that case because indeed it seems to be right on as it concerns this one. Mr. Rogers received a less than favorable job position as an EEOC director. And the court in that instance found, as the Court must here as well, that the selection perhaps was not completely neutral. However, the court concludes, as this Court has concluded, that monetary relief should be denied a Title VII plaintiff if his qualifications were such that he would not, even absent discrimination, have been selected for the position in question. Congress did not intend to make employers liable for failure- (p. 14) to-hire decisions that are only partially based on discriminatory considerations, and the citation of that case is 551 F. 2d 456. It is a United States Court of Appeals from the District of Columbia. The language is specifically at page 457. Shepardizing this this afternoon, the Court stumbled on one of the cases in which it didn't do so well at the Seventh Circuit, but the Seventh Circuit at least accepted the Court's

reasoning to some extent in *Cavialli v. State of Wisconsin,* 744 F. 2d 1289, Seventh Circuit, 1984 in which the Seventh Circuit agreed with this Court when it enunciated that Title VII was not intended to guarantee a job to evrey person regardless of qualifications.

The Court has found and does conclude that Ms. Cherney was more qualified than Mr. McQuillen. The Court believes that the determination of Mr. Andrews on that score was correct even though there was that predisposition.

For there to be any recovery the lost position must be traced to the defendant's discriminatory acts and not to a legitimate non-discriminatory decision to hire one better qualified for the position. And the Court finds that that legitimate articulation is not pretextual in nature.

Accordingly, the Court will dismiss the complaint of the defendant against the plaintiff, with prejudice and costs.

(p. 15) And, the Court was so interested in being verbose—I quess Mr. Katz, it is catching. This one-and-a-half-day trial has extended beyond the bounds which the Court believes to be appropriate parameters, by the wealth of inappropriate testimony brought to the Court's attention and which it has not considered.

The issue was indeed clear. Indeed it was so clear that the Court had little difficulty in enunciating its findings that it has from the bench, with the understanding that it may very well review those and make a treatise out of them if it finds it wants to become a law clerk again.

The fact is that the case is dismissed as indicated. If I haven't already stated as the conclusion of law I will so state that the Court determines that there was not retaliatory action as it concerns the count of the health insurance.

This then concludes the matter for the time-being anyway. And this Court is adjourned for the day.

Thank you.

(Which concluded the Court's statements at 5:50 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON MCQUILLEN,

plaintiff,

-vs-

WISCONSIN EDUCATION
DONALD E. KRAHN, and
ASSOCIATION COUNCIL,
MORRIS ANDREWS,

Defendants.

MOTION FOR
NEW TRIAL
AND/OR TO
AMEND JUDGMENT

Case No. 85-C-648-S

The plaintiff, Gordon E. McQuillen, by his attorneys, Fox, Fox, Schaefer & Gingras, S.C., by Robert J. Gingras, and A. Steven Porter, hereby moves the Court pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure for a new trial and/or to amend the judgment entered in the above-entitled action.

Specifically, plaintiff moves the Court to amend its findings of fact and conclusions of law and judgment in this matter so as to grant the plaintiff the following relief:

1. That the Affirmative Action plan of the defendant WEAC (Exhibit 69) be declared illegal and that it be abolished;

2. That the plaintiff be awarded reasonable attorneys' fees and costs as it relates to the Court's finding that the Affirmative Action plan of WEAC (Exhibit 69) is illegal and its conclusion and judgment that said plan be abolished;

3. That the Affirmative Action plan of WEAC (Exhibit 69) was a determining factor in causing the

sex of the plaintiff to be a motivating factor in WEAC's decision to reject his application for employment in the fifth staff counsel position and that plaintiff is entitled to reasonable attorneys' fees and costs with respect to this finding;

4. That the plaintiff is entitled to attorneys' fees and costs with respect to the Court's finding that the sex of the plaintiff was a motivating factor in the defendant's decision to reject plaintiff for the fifth staff counsel position.

5. That the Court reconsider its finding of fact that the sex of plaintiff was not a determining factor in WEAC's decision to reject his application for the fifth staff counsel position; and

6. Injunctive relief against future and continued discrimination.

This motion is based upon the pleadings and record herein as well as plaintiff's proposed findings of fact and conclusions of law, plaintiff's trial brief, the record at trial, the Court's findings of fact and conclusions of law, and plaintiff's memorandum in support of plaintiff's motion for a new trial and/or to amend judgment.

Dated this 10th day of March, 1986.

Respectfully submitted,

By

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FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-999

In The
Supreme Court of the United States
October Term, 1987

GORDON E. McQUILLEN,

Petitioner,

v.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, and MORRIS ANDREWS,

Respondents.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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February 23, 1988

The Court should be advised that it may wish to consider the Petition for for Writ of Certiorari in the above-captioned case, which is scheduled for hearing on Friday, February 19, 1988, with the Petition for Certiorari in the case Price Waterhouse v. Hopkins, Docket No. 87-1167, which is scheduled for hearing on March 4, 1988. Both petitions seek court review of the conflict in the circuit courts of appeal over the Mt. Healthy[1] "but for" standard of causation as applied in Title VII mixed motives cases and particularly whether the plaintiff or the defendant has the burden of proof on the "but for" issue.

In McQuillen, the Seventh Circuit Court of Appeals ruled that the plaintiff

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[1] Mt. Healthy v. Doyle, 429 U.S. 274 (1977).

has the burden of proof whereas in Price Waterhouse the D.C. Circuit Court of Appeals placed the burden on the defendant. This obvious conflict, together with the fact that both petitions were filed simultaneously from different circuits, highlights the current confusion in the circuit courts of appeal and the need for Supreme Court review.

Dated at Madison, Wisconsin, this 23rd day of February, 1988.

Respectfully submitted,

Gordon McQuillen, Petitioner

By

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RULE 28.1 LISTING

The respondent, the Wisconsin Education Association Council, is an affiliate of the National Education Association.

Dated at Madison, Wisconsin this 23rd day of February, 1988.

Respectfully submitted,
Gordon E. McQuillen,
Petitioner

By
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SUPREME COURT OF THE UNITED STATES

GORDON E. McQUILLEN *v.* WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87-999. Decided February 29, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the question whether a plaintiff may prevail on a disparate treatment claim under Title VII of the Civil Rights Act, 42 U. S. C. § 2000e *et seq.*, only by establishing that the employer's discriminatory intent was the "but for" cause of the adverse employment action.

The Court of Appeals for the Seventh Circuit held in this case that a Title VII plaintiff must prove that "the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation." 830 F. 2d 659, 664 (1987). The court found support for this "but for" standard of causation in the language of Title VII, which prohibits employers from discriminating against an employee or potential employee "*because of* such individual's race, color, religion, sex or national origin." § 20003-2(a)(1) (emphasis added).

The Seventh Circuit expressly rejected the standard of causation adopted by the Eighth Circuit in *Bibbs* v. *Block*, 778 F. 2d 1318 (1985) (en banc). A plaintiff can establish Title VII liability under *Bibbs* merely by proving that "an unlawful motive played some part in the employment decision." *Id.*, at 1323. If the employer establishes that discriminatory intent was not the determinative factor in the employment decision, however, the plaintiff's recovery is limited to de-

claratory relief, an injunction against future or continued discrimination, and partial attorney's fees.

The Seventh Circuit's view that Title VII liability is established only when an unlawful motive was the "but for" cause of the challenged employment action is shared by three other circuits. See *Haskins* v. *United States Dept. of the Army*, 808 F. 2d 1192, 1198, cert. denied, —— U. S. —— (1987); *Lewis* v. *University of Pittsburgh*, 725 F. 2d 910, 915–916 (CA3 1983), cert. denied, 469 U. S. 982 (1984); *Mack* v. *Cape Elizabeth School Bd.*, 553 F. 2d 720, 722 (CA1 1977). Two circuits have indicated that the discriminatory motive must be a "significant" or "substantial" factor, but not necessarily the determinative factor, before liability may be imposed on an employer under Title VII. See *Fadhl* v. *City & County of San Francisco*, 741 F. 2d 1163, 1166 (CA9 1984); *Whiting* v. *Jackson State University*, 616 F. 2d 116, 121 (CA5 1980).

Accordingly, in view of the divergent positions taken by the Federal Courts of Appeals with regard to the standard of causation to be applied in determining Title VII liability, I would grant certiorari.